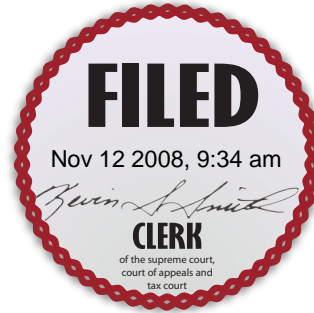


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

ERNEST JOHNSON III,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 85A05-0712-PC-753

APPEAL FROM THE WABASH CIRCUIT COURT
The Honorable Rosemary Higgins Burke, Special Judge
Cause No. 85C01-9908-CF-46

November 12, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

The Wabash Circuit Court denied a petition for post-conviction relief filed by Ernest Johnson III (“Johnson”). Johnson appeals and claims that the post-conviction court erred in determining that he was not denied the effective assistance of trial and appellate counsel. We affirm.

Facts and Procedural History

On August 6, 1999, the State charged Johnson with Class D felony confinement, Class B felony robbery, Class D felony auto theft, and Class A misdemeanor battery. On August 9, 1999, trial counsel was appointed to represent Johnson.

On February 2, 2000, the trial court rejected Johnson’s guilty plea. On March 2, 2000, the trial court denied Johnson’s request for a change of counsel. On March 14, 2000, the jury trial began. The jury was unable to agree on a verdict and, on March 16, 2000, the trial court declared a mistrial. The new trial was set for May 3, 2000.

The parties arrived in court on the May 3, 2000 trial date, anticipating a guilty plea. However, Johnson notified the trial court that he would not be pleading guilty. The jury trial was therefore continued to June 8, 2000, and Johnson was found guilty on all charges.

Appellate counsel was appointed to represent Johnson on appeal and timely filed the praecipe on July 25, 2000. Upon direct appeal of his convictions, Johnson claimed that trial counsel provided ineffective assistance of counsel by failing to object to allegedly suggestive pretrial identification procedures and that the admission of Johnson’s mugshots and testimony about the pretrial identification was fundamental

error. Johnson v. State, No. 85A04-0008-CR-319, slip op. at 2 (Ind. Ct. App. Dec. 27, 2001). This court affirmed the trial court in all respects. Id. at 7.

Following an unsuccessful motion to modify sentence, Johnson filed a petition for post-conviction relief on January 30, 2002. The State filed a response on February 4, 2002 and Johnson amended his petition on February 21, 2002. On August 22, 2006, a post-conviction relief hearing was held. The post-conviction court denied Johnson's petition on November 27, 2007. Johnson appeals.

Standard of Review

Post-conviction proceedings are not “super appeals” through which convicted persons can raise issues they failed to raise at trial or on direct appeal. McCary v. State, 761 N.E.2d 389, 391 (Ind. 2002). Rather, post-conviction proceedings afford petitioners a limited opportunity to raise issues that were unavailable or unknown at trial and on direct appeal. Davidson v. State, 763 N.E.2d 441, 443 (Ind. 2002). The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5) (2006); Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Fisher, 810 N.E.2d at 679. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id.

The post-conviction court entered findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6) (2006). “A post-conviction court's

findings and judgment will be reversed only upon a showing of clear error –‘that which leaves us with a definite and firm conviction that a mistake has been made.’” Ben-Yisrayl v. State, 729 N.E.2d 102, 106 (Ind. 2000) (quoting State v. Moore, 678 N.E.2d 1258, 1261 (Ind. 1997)). Although we accept findings of fact unless they are clearly erroneous, we give conclusions of law no deference. Fisher, 810 N.E.2d at 679.

Discussion and Decision

Johnson claims that he was denied both effective assistance of trial and appellate counsel.

Claims of ineffective assistance of trial counsel are generally reviewed under the two-part test announced in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Thus, a claimant must demonstrate that counsel’s performance fell below an objective standard of reasonableness based on prevailing professional norms, and that the deficient performance resulted in prejudice. Prejudice occurs when the defendant demonstrates that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” A reasonable probability arises when there is a “probability sufficient to undermine confidence in the outcome.”

Appellate review of the post-conviction court’s decision is narrow. We give great deference to the post-conviction court and reverse that court’s decision only when “the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the postconviction court.”

Although the two parts of the Strickland test are separate inquiries, a claim may be disposed of on either prong. Strickland declared that the “object of an ineffectiveness claim is not to grade counsel’s performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed.”

Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006) (internal citations omitted).

Moreover, we presume that counsel provided adequate assistance, and we give deference to counsel’s choice of strategy and tactics. Smith v. State, 765 N.E.2d 578, 585 (Ind.

2002). “Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective.” Id.

A. Ineffective Assistance of Trial Counsel

Johnson first argues that his trial counsel provided ineffective assistance. The post-conviction court determined that Johnson could not raise any claims of ineffective assistance of trial counsel because he asserted those claims on direct appeal. Appellant's Appendix at 23-24. If a defendant claims on direct appeal that his trial counsel was ineffective, he may not raise further issues of trial counsel error during post-conviction review. See Woods v. State, 701 N.E.2d 1208, 1220 (Ind. 1998). The post-conviction court correctly concluded that Johnson was barred from raising these claims in his petition for post-conviction relief.

B. Ineffective Assistance of Appellate Counsel

A petitioner arguing ineffective assistance of appellate counsel based upon appellate counsel's failure to properly raise and support a claim of ineffective assistance of trial counsel faces a compound burden. Dawson v. State, 810 N.E.2d 1165, 1177 (Ind. Ct. App. 2004), trans. denied. A petitioner making such a claim must demonstrate that appellate counsel's performance was deficient and that, but for the deficiency of appellate counsel, trial counsel's performance would have been found deficient and prejudicial. Id. The petitioner must establish the two elements of ineffective assistance of counsel separately as to both trial and appellate counsel. Id. We must first examine whether trial counsel's actions constituted effective assistance, and then determine if appellate counsel

provided ineffective assistance of counsel by failing to raise such issues in the direct appeal

Johnson argues that appellate counsel should have addressed Johnson's claim that an irreconcilable conflict with his trial counsel existed. Johnson claims that trial counsel pressured him into taking a plea agreement, that trial counsel's presentation of Johnson's alibi defense caused strife between attorney and client, that Johnson became so dissatisfied with trial counsel's advocacy that Johnson would not cooperate or communicate with trial counsel, and that trial counsel's fear of Johnson prevented communication. Johnson concludes that the lack of communication and attorney-client disagreements regarding strategy resulted in a conflict that prevented him from receiving effective assistance of trial counsel.

Johnson has failed to show how the issues that arose between himself and trial counsel resulted in prejudice. Because Johnson failed to show how he had been prejudiced by the breakdown of the attorney-client relationship, appellate counsel could not have provided ineffective assistance of counsel for failing to raise the issue on appeal.

Johnson also contends that appellate counsel should have addressed trial counsel's representation of a State's witness on an unrelated sentence modification matter. Johnson argues that the representation constituted an actual conflict of interest that adversely affected trial counsel's performance.

While trial counsel's representation of Johnson and Burkett may have overlapped, trial counsel had completed his representation of Burkett on February 17, 2000 after Burkett's sentencing hearing. Also, there is no evidence that trial counsel entered into

discussions with the State regarding Burkett's testimony at Johnson's trial or otherwise represented Burkett at any time following sentencing.

At the second trial, trial counsel questioned Burkett regarding Burkett's reasons for testifying against Johnson, including a possible sentence modification. Johnson fails to mention his letter to Burkett prior to trial that asked Burkett to support his alibi defense and provided him with the "correct" timeline for the evening in question. Tr. p. 453. Trial counsel's questioning repeatedly sought to discredit Burkett as a witness. Johnson provided no evidence at the post-conviction hearing or on appeal that trial counsel's performance was adversely affected by his prior representation of Burkett. Trial counsel appears to have done an admirable job in his representation of Johnson, especially Johnson's unpredictable and damaging conduct throughout the proceedings.

Johnson has failed to show that trial counsel had an actual conflict of interest and that such a conflict adversely affected trial counsel's representation of Johnson. Because Johnson failed to show the existence of an actual conflict of interest and failed to show how he had been prejudiced by that non-existent conflict of interest, appellate counsel could not have provided ineffective assistance of counsel for failing to raise the issue on appeal.

Finally, Johnson argues that he was denied effective assistance of appellate counsel because appellate counsel sat as judge pro tem at his initial hearing, appointed trial counsel, and ruled on Johnson's motion for speedy trial. He alleges that appellate counsel's prior involvement in his case, as judge pro tem, constitutes a conflict of interest. Johnson claims that appellate counsel, sitting as judge pro tem, actually filed the

charges against him. However, testimony by appellate counsel at the post-conviction hearing belies Johnson's claim. PCR Tr. P. 14. Prior to the initial hearing, probable cause has already been found. Id. At the hearing, in any felony case, a not guilty plea is automatically entered on the behalf of the defendant. Id. Appellate counsel testified that the types of duties she did as judge pro tem consisted of purely ministerial acts and that she had no discretion whether it was setting dates for trial or hearing, appointing pauper counsel, or notifying a defendant of the charges against him. Id.

Appellate counsel's actions as a judge pro tem do not rise to the level of a conflict of interest where said counsel took administrative actions over which she had little or no discretion. Johnson has not shown how he was prejudiced by appellate counsel's actions as judge pro tem, therefore he has failed to show that appellate counsel provide ineffective assistance of counsel.

Conclusion

The post-conviction court properly concluded that Johnson had failed to establish his claims of ineffective assistance of trial and appellate counsel.

Affirmed.

BAKER, C.J., and BROWN, J., concur.